

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7447

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-7447

MADELINE ERIA, Individually and as Administratrix of the
goods, chattels and credits which were of VINCENT M.
ERIA, deceased,

Plaintiff,

—against—

TEXAS EASTERN TRANSMISSION CORP., TEXAS EASTERN CRYO-
GENICS, INC., BROWN & ROOT, INC., NAPP GRECCO
COMPANY, BATTELLE MEMORIAL INSTITUTE, THE DOW
CHEMICAL COMPANY, G. T. SCHJELDAHL, INC. and E. I.
DuPONT DeNEMOURS & Co.,

Defendants.

TEXAS EASTERN TRANSMISSION CORPORATION
and TEXAS EASTERN CRYOGENICS, INC.,

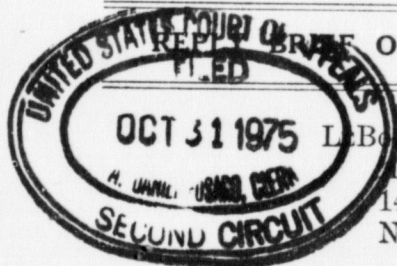
Defendants-Appellants,

—against—

THE DOW CHEMICAL COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



OCT 31 1975

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

Defendants-Appellants submit this brief in reply to the
brief of defendant-appellee Dow, which tenders three argu-
ments in an effort to sustain the unsustainable injunction
against a related proceeding in a Texas state court.

Dow's choice as its chief argument—that Judge Costantino's Order of August 1, 1975 was not an injunction—conclusively demonstrates the weakness of its position. Appellants are first chided for not having “indicated or pointed out any words, phrases, sentences, or intent” actually enjoining Texas Eastern's conduct in the Texas state court action. (Dow brief, p. 5).

Thus called on to demonstrate the obvious:

(a) as to “words, phrases, sentences,” the Order (A. 143a) recites:

“[T]his court holds that TETCO must . . . refrain from noticing discovery procedures in the state action in Texas. . . .”

(b) as to “intent,” Judge Costantino stated his object forcefully in his ruling from the bench on July 23, 1975, (A. 131a):

“My ruling is—The motion is granted and it's stayed. It's stayed from proceeding.”

It does not take ingenious counsel to find the injunction lurking in these rulings. Cf. 9 *Moore's Federal Practice* ¶110.20 [1] at 232 (1973). Texas Eastern could only notice discovery procedures at the peril of being held in contempt. Judge Costantino has pointedly warned counsel for Texas Eastern (A. 56a):

“I will run my court as I see fit . . . You are not going to interfere with the discovery procedure in New York by having the action in Texas interfere with this Court.”

Dow next argues that an order enjoining discovery is non-appearable, citing truncated phrases from *Moore's Federal Practice* and inapposite decisions concerning

appealability of a District Court's stay of its own proceeding.

Each of Dow's cases deals with orders that enjoin or refuse to enjoin aspects of the action before the court.* On the contrary, an order restraining or refusing to restrain a state court proceeding is appealable, *McGough v. First Arlington National Bank*, 519 F.2d 552 (7th Cir. 1975); *Vernitron Corp. v. Benjamin*, 440 F.2d 105 (2d Cir. 1971), *cert. denied* 402 U.S. 987 (1971); *Cray, McFawn & Co. v. Hegarty, Conroy & Co.*, 85 F.2d 516 (2d Cir. 1936); as is an order restraining another federal court, *Kerotest Mfg. Co. v. C-O Two Fire Equipment Co.*, 189 F.2d 31 (3d Cir. 1951), *affirmed* 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952); or a foreign court, *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577 (1st Cir. 1969); or other proceedings generally, *Firestone Tire & Rubber Co. v. International Union, etc.*, 476 F.2d 603, 604-05 (5th Cir. 1973).

This fundamental distinction, which mandates the appealability of Judge Costantino's order, was reaffirmed by the Supreme Court in *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 183 (1955):

"The point was made in the *Enelow*** case that power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court."

Enelow found appealable an order staying an action at law pending the determination of proceedings in equity. *En*

* Especially inapposite is Dow's citation to this Court's recent decision in *Parents Committee, etc. v. The Community School Board, etc.* — F.2d — (2d Cir. 1975), Docket No. 75-7297, decided August 25, 1975. There, indeed, the Court allowed an appeal pursuant to §1292(a)(1) of an order requiring mandatory action in connection with discovery in its own case. Judge Friendly, concurring, preferred to rest the appellate jurisdiction on §1291 and the doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949).

** *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379 (1935).

route Mr. Chief Justice Hughes made the point, 293 U.S. at 382:

"The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of [§ 1292]."

In the light of all this authority Professor Moore, not surprisingly, arrives at a conclusion opposite to that suggested by Dow, 9 *Moore's Federal Practice* ¶110.19[1] at 207:

"... [A]n interlocutory order that grants or denies an injunction may be broadly defined as an order ... that prevents or refuses to prevent other litigation pendente lite."

Dow's other points do not deter the required reversal of the offending Order. Point II attempts to justify Judge Costantino's Order by arguing his good faith in entering it. Neither good faith nor imputed "sensitivity" is an issue under § 2283, nor overcomes its bar against injunctions.

Finally, Dow argues (Point III) that the Order was not based on § 2283, an irrelevance since the Order violates that section and the principle of a dual system of courts. The Order below contravenes § 2283, albeit through the indirection of twisting the stipulation of March 12, 1975 into the opposite of its meaning. There was never any legitimate doubt about appellants' limited agreement voluntarily to abide a June 2 trial date. See for example, the argument just preceding the order of injunction (A. 125a-126a):

"Mr. Sifton: I can't see how Mr. Rivkin can say the stipulation covers this situation months after June. They didn't introduce it down there before

the court because if he had the stipulation, which he says today he has, he wouldn't have had to make a motion in Texas. He knows very well he went down to Texas to obtain the same relief.

The Court: How do you read the stipulation?

Mr. Sifton: Your Honor, the stipulation was entered into because at that time we contemplated a trial in June.

The Court: Right.

Mr. Sifton: We contemplated discovery going forward in June. Under those circumstances to cover that very limited problem of a June trial, we said that if the case goes forward in June, if witnesses are called in the spring from Dow, and if a June trial will not go ahead, we will in the spring depose the Dow people up here. We're way past the spring and we still have not had discovery in the Texas action, not had discovery up here. We want to get started down in Texas.

The Court: Is it limited to June? It covers all contingencies. If for any reason at the end of the deposition, do you want witnesses this spring here? If this trial will not go forward in June—

Mr. Sifton: That covers—

The Court: Dow makes witnesses available in New York for depositions in the Texas case.

Mr. Sifton: That covers the two contingencies of a trial, the trial going forward in June or not.

The Court: But it didn't go forward in June. Said 'be deposed in New York.'

Mr. Sifton: Nor, your Honor, were there depositions in the spring. So this stipulation—in all honesty, your Honor, we would not foreclose ourselves for all times and put ourselves behind in a personal injury case. That was a limited situation which we contemplated in June, in which we tried to assist this Court in trying to get forward with a June trial. But we didn't foreclose ourselves for all time and put ourselves eternally behind the progress of the personal injury case."

On March 12 the parties had the Court's direction to proceed to trial on June 2, and cast their stipulation in those terms. Not until May was that June date deferred (A.127a), and on June 2 the significance of the stipulation evaporated. The trial did not commence as scheduled, and discovery in the State Court action was to go forward.

CONCLUSION

For the reasons stated herein and in the Brief of Defendant-Appellants dated September 29, 1975 the Order of August 1, 1975 should be reversed.

Respectfully submitted,

Le Boeuf, Lamb, Leiby & MacRae
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DAVID R. POE

Dated: New York, New York
October 30, 1975

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E.I. DUPONT deNEMOURS & CO.

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AFFIDAVIT
OF SERVICE

-----x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)


DAVID R. POE, being duly sworn, deposes and says
that:

Deponent is not a party to this action, is over 18
years of age and is employed by the firm of LeBoeuf, Lamb,
Leiby & MacRae, 140 Broadway, New York, New York 10005.

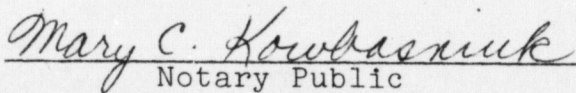
In the afternoon on the 30th day of October, 1975
deponent caused two copies of the Reply Brief of defendants-
appellants Texas Eastern Transmission Corporation and Texas
Eastern Cryogenics, Inc. to be served by mail on counsel for
defendant-appellee The Dow Chemical Company.

Service was effected by depositing in a United States mail box in the lobby of 140 Broadway, New York a package containing two copies of the aforementioned Reply Brief of defendants-appellants to which was affixed a label containing the following information:

Leonard L. Rivkin, Esq.
Rivkin, Leff & Sherman
100 Garden City Plaza
Garden City, New York 11530


David R. Poe

Sworn to before me this
30th day of October, 1975.


Notary Public

MARY C. KOWBASNIUK
Notary Public, State of New York
No. 31-4515180
Qualified in New York County
Commission Expires March 30, 1977

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